90

Supreme Court, U.S.
FILED

07 1331 APR 18 2008

OFFICE OF THE CLERK

No. 07-

IN THE

Supreme Court of the United States

T-MOBILE USA, INC.,

Petitioner,

v.

KEVIN JANDA AND MANJIT SINGH, INDIVIDUALLY, AND ON BEHALF OF OTHER PERSONS SIMILARLY SITUATED AND THE GENERAL PUBLIC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

STEPHEN M. RUMMAGE
KRISTINA SILJA BENNARD
DAVIS WRIGHT TREMAINE LLP
Suite 2200
1201 Third Avenue
Seattle, WA 98101
(206) 622-3150

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
PETER C. PFAFFENROTH
JAMES C. OWENS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner T-Mobile USA, Inc.

* Counsel of Record

April 18, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether this petition for certiorari should be held pending this Court's disposition of the petition for certiorari previously filed in *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008), given that both cases present the same important question:

Whether, under the Federal Arbitration Act, a federal court may refuse to enforce the terms of an agreement to arbitrate based upon a state-law policy that individual arbitration is unconscionable in cases involving small claims by a consumer.

LIST OF PARTIES AND AFFILIATES

Pursuant to Rule 29.6 of the Rules of this Court, T-Mobile USA, Inc., states that it is a wholly-owned subsidiary of T-Mobile Global Holding GmbH, which is a wholly-owned subsidiary of T-Mobile International AG, which, in turn, is a wholly-owned subsidiary of Deutsche Telekom AG. Deutsche Telekom AG is a publicly-traded company, of which approximately 14.83% and 16.87% is owned by the Federal Republic of Germany and the Kreditanstalt für Wiederaufbau (a bank controlled by the Government of the Federal Republic of Germany), respectively. No other publicly-held company owns 10% or more of T-Mobile USA, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND AFFILIATES	ii
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
STATUTORY BACKGROUND	5
FACTUAL BACKGROUND	7
REASONS FOR GRANTING THE PETITION	10
CONCLUSION	12
APPENDIX A: *Kevin Janda; Manjit Singh et al.* v. *T-Mobile USA, Inc.*, No. 06-15712 (9th Cir. Feb. 25, 2008)	1a
APPENDIX B: *Kevin Janda et al.* v. *T-Mobile USA, Inc.*, No. C 05-03729 JSW (N.D. Cal. Mar. 17, 2006)	3a
APPENDIX C: T-Mobile Terms and Conditions	24a

TABLE OF AUTHORITIES

CASES Page

Allied-Bruce Terminix Cos. v. *Dobson*, 513 U.S. 265 (1995) 6
Circuit City Stores v. *Adams*, 532 U.S. 105 (2001) 5, 6
Dean Witter Reynolds Inc. v. *Byrd*, 470 U.S. 213 (1985) 6
Discover Bank v. *Superior Court*, 113 P.3d 1100 (Cal. 2005) 9
Doctor's Assocs. Inc. v. *Casarotto*, 517 U.S. 681 (1996) 7
Gatton v. *T-Mobile USA, Inc.*, 152 Cal. App. 4th 571 (2007) 3
Gay v. *CreditInform*, 511 F.3d 369 (3d Cir. 2007) 3
Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) 5
Ingle v. *Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003) 10
Jenkins v. *First Am. Cash Advance*, 400 F.3d 868 (11th Cir. 2005), *cert. denied*, 546 U.S. 1214 (2006) 3
Johnson v. *West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000) 3
Livingston v. *Associates Fin., Inc.*, 339 F.3d 553 (7th Cir. 2003) 3
Lowden v. *T-Mobile USA, Inc.*, 512 F.3d 1213 (9th Cir. 2008) 4, 10
Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) 5
Moses H. Cone Mem'l Hosp. v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983) 6
Perry v. *Thomas*, 482 U.S. 483 (1987) 3, 6, 7
Randolph v. *Green Tree Fin. Corp.*, 244 F.3d 814 (11th Cir. 2001) 4

TABLE OF AUTHORITIES – continued

	Page
Shroyer v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007)	3, 10
Snowden v. *CheckPoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002)	3
Southland Corp. v. *Keating*, 465 U.S. 1 (1984)	6
T-Mobile USA, Inc. v. *Laster*, No. 07-976 (filed Jan. 23, 2008)	2, 11
Tillman v. *Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008)	4
Volt Info. Scis., Inc. v. *Board of Trs.*, 489 U.S. 468 (1989)	5, 6

STATUTES

9 U.S.C. § 2	1
9 U.S.C. § 4	5

PETITION FOR A WRIT OF CERTIORARI

Petitioner T-Mobile USA, Inc. ("T-Mobile"), respectfully requests that this Court grant the petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the United States District Court for the Northern District of California denying T-Mobile's motion to compel arbitration is unreported and is reproduced in the Appendix to this Petition ("Pet. App.") at 3a-23a. The opinion of the Ninth Circuit affirming the district court is likewise unreported and is reproduced at Pet. App. 1a-2a.

JURISDICTION

Plaintiffs originally filed this lawsuit in the Superior Court of California in and for Alameda County. T-Mobile removed the action to federal court in September 2005. Pet. App. 4a. The district court had jurisdiction under 28 U.S.C. §§ 1332(d) and 1453(b). The Ninth Circuit, which rendered its decision below on February 25, 2008, had appellate jurisdiction over the district court's denial of T-Mobile's motion to compel arbitration under 9 U.S.C. § 16(a)(1). T-Mobile invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides in pertinent part:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising

> out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or equity for the revocation of any contract.

STATEMENT OF THE CASE

This case presents the recurring question whether Section 2 of the Federal Arbitration Act ("FAA") permits federal courts to refuse to enforce the terms of private agreements that expressly preclude class-based arbitration because state law deems agreements requiring individual arbitration of consumer claims to be substantively unconscionable. The petition for certiorari in *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008), presents the same question. For the reasons fully set forth in the petition in *Laster*, the question presented warrants the grant of certiorari. Accordingly, petitioner respectfully requests that this case be held pending disposition of the petition in *Laster* and resolved consistent with that petition.[1]

Respondents Kevin Janda and Manjit Singh were T-Mobile subscribers who each entered into contracts in which they agreed to resolve any disputes with T-Mobile through individual arbitration. Notwithstanding those agreements, they filed a class action on behalf of themselves and all similarly situated California consumers claiming that petitioner violated California law by charging Universal Service Fund fees in addition to advertised prices, and by allegedly billing customers for telephone calls made

---

[1] In addition, the same issue also is presented and has been briefed in *T-Mobile USA, Inc.* v. *Ford*, No. 07-1103 (filed Feb. 22, 2008).

during a different billing period or for calls that had been advertised as being free of charge.

The court below, applying prior Ninth Circuit and California precedent in *Shroyer* v. *New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007), and *Gatton* v. *T-Mobile USA, Inc.*, 152 Cal. App. 4th 571 (2007), held that respondents' agreements to arbitrate on an individual basis were unenforceable.

As set forth in T-Mobile's pending petition for certiorari in *Laster* (No. 07-976), such decisions conflict with the Third Circuit's ruling in *Gay* v. *CreditInform*, 511 F.3d 369 (3d Cir. 2007). There, the Third Circuit, relying on this Court's decision in *Perry* v. *Thomas*, 482 U.S. 483 (1987), ruled that the FAA precludes a court from refusing to enforce an agreement to arbitrate individually based upon a state-law determination that individual arbitration of small consumer claims is unconscionable. 511 F.3d at 395. The *Gay* court concluded that the FAA preempts state unconscionability standards to the extent that they would render individual arbitration unenforceable. Denying enforcement on those grounds, the Third Circuit explained, would be tantamount to "'rely[ing] on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.'" *Id.* (quoting *Perry*, 482 U.S. at 492 n.9).[2]

---

[2] The *Gay* decision builds on decisions by other federal circuits holding that individual arbitration is appropriate for resolving federal and state claims by consumers in cases involving relatively small individual amounts. *See Johnson* v. *West Suburban Bank*, 225 F.3d 366, 373 (3d Cir. 2000); *accord Jenkins* v. *First Am. Cash Advance*, 400 F.3d 868, 878 (11th Cir. 2005), *cert. denied*, 546 U.S. 1214 (2006); *Livingston* v. *Associates Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003); *Snowden* v. *CheckPoint Check Cashing*, 290 F.3d 631, 638-39 (4th Cir.

The Ninth Circuit has expressly declined "to follow the Third Circuit's holding in *Gay*." *Lowden* v. *T-Mobile USA, Inc.*, 512 F.3d 1213, 1221 n.3 (9th Cir. 2008). And, more recently, a majority of the Supreme Court of North Carolina followed the approach staked out by the Ninth Circuit in striking down an arbitration agreement that required individual arbitration. *Tillman* v. *Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008). In contrast, the dissent in *Tillman* would have upheld the agreement to arbitrate under the Third Circuit's reasoning in *Gay*. *Id.* at 387 (Newby, J., dissenting).

This case, like the ruling in *Laster*, implicates the same conflict over the enforceability of agreements to arbitrate consumer claims individually. In the ruling below, the Ninth Circuit applied *Shroyer* to hold that the FAA does not mandate enforcement of these agreements. Pet. App. 2a. In contrast, the Third Circuit in *Gay* ruled that the FAA does require enforcement of agreements requiring individual arbitration of consumer claims, and thus preempts state law to the contrary. Moreover, the Third, Fourth, Seventh, and Eleventh Circuits all have held – unlike the decision below – that individual arbitration allows for the effective resolution of claims in cases involving consumers. See Pet'n for Certiorari at 11-25, *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008).

Resolution of this conflict by this Court is necessary because the proper application of the FAA to consumer arbitration agreements presents a recurring issue of fundamental and national importance. The enforceability of agreements to

---

2002); *Randolph* v. *Green Tree Fin. Corp.*, 244 F.3d 814, 818 (11th Cir. 2001).

arbitrate under the FAA affects the rights of tens of millions of consumers and businesses. Indeed, a state-law rule that arbitration must provide a class-wide mechanism for resolving disputes directly undercuts the benefit of arbitration as a streamlined, low-cost *alternative* to litigation. Decisions by courts that invalidate the terms of these arbitration agreements undermine the "primary purpose" of the FAA: to counteract judicial hostility to arbitration and to ensure that arbitration remains a viable alternative to litigation through enforcement of agreements to arbitrate in accordance with their terms. See *Volt Info. Scis., Inc.* v. *Board of Trs.*, 489 U.S. 468, 479 (1989); 9 U.S.C. § 4; see also Pet'n for Certiorari at 25-29, *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008).

Petitioner requests that this case be held pending the disposition of the petition for certiorari in *Laster*, No. 07-976 (filed Jan. 23, 2008), and resolved as appropriate in light of that disposition.

STATUTORY BACKGROUND

In 1925, Congress enacted the FAA in response "to hostility of American courts to the enforcement of arbitration agreements." *Circuit City Stores* v. *Adams*, 532 U.S. 105, 111 (2001). Congress sought to promote arbitration as a meaningful alternative to litigation. "[B]y agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer* v. *Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). Indeed, "it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts [parties] to forgo access to judicial remedies." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985).

For that reason, "Congress, when enacting [the FAA], had the needs of consumers, as well as others, in mind." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995).

The "primary purpose" of the FAA is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc.* v. *Board of Trs.*, 489 U.S. 468, 479 (1989). Arbitration agreements must be "rigorously enforce[d]" even if "the result is 'piecemeal' litigation." *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). Indeed, Section 2 of the FAA "compels judicial enforcement of a wide range of written arbitration agreements," *Circuit City*, 532 U.S. at 111, "'notwithstanding any state substantive or procedural policies to the contrary.'" *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987) (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

Under the FAA, "the underlying issue of arbitrability" is "a question of substantive federal law," *Southland Corp.* v. *Keating*, 465 U.S. 1, 12 (1984), that "must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone*, 460 U.S. at 24. In determining whether an agreement to arbitrate is enforceable, "the text of § 2 provides the touchstone for choosing between state-law principles and the principles of federal common law." *Perry*, 482 U.S. at 492 n.9. As explained in *Perry*, "[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law* 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Id.* (quoting 9 U.S.C. § 2) (internal citation omitted; emphasis added by Court). "[S]tate law . . . is applicable *if* that law arose to govern issues

concerning the validity, revocability, and enforceability of contracts generally." *Id.* at 493 n.9.

"Courts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Assocs. Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996); see *Perry*, 482 U.S. at 493 n.9. Likewise, courts may not (i) refuse enforcement based on state laws applicable only to certain types or categories of contracts, *Southland*, 465 U.S. at 16 n.11, or (ii) rely upon a fundamental aspect of arbitration as a basis for a ruling that arbitration is unconscionable, *Perry*, 482 U.S. at 493 n.9.

FACTUAL BACKGROUND

Petitioner T-Mobile markets and sells wireless telecommunications services, phones, and accessories throughout the United States. Pursuant to requirements established by the Federal Communications Commission, T-Mobile is required to pay a Universal Service Fund ("USF") fee, and T-Mobile at certain times has passed through USF fees to its customers in accordance with FCC guidance. See 9th Cir. Excerpts of Record ("ER") at 14-16. In addition, T-Mobile charges customers for calls on a per-minute basis when they have exceeded their allotted minutes and may also charge additional fees for certain calls. *Id.* at 16.

a. In or about August 2002, respondent Manjit Singh ("Singh") initiated wireless service with T-Mobile, and later, in April 2004, Singh exchanged his handset for another T-Mobile phone. Pet. App. 4a. The district court below found that Singh agreed to the terms of T-Mobile service agreements applicable in 2002 and 2004 ("Singh Agreement"). *Id.* at 14a. Respondent Kevin Janda ("Janda") executed and signed a T-Mobile service agreement on or about

March 31, 2005 ("Janda Agreement"). *Id.* at 8a; ER 65.

Respondents Singh and Janda both signed service agreements that made it clear that they were agreeing to mandatory arbitration, and their T-Mobile phones came with the T-Mobile Welcome Guide that set forth in full the terms and conditions of service. Respondent Janda's Service Agreement advised that it "REQUIRES MANDATORY ARBITRATION OF DISPUTES" including "WAIVER OF THE RIGHT TO JURY TRIAL AND WAIVER OF ANY ABILITY TO PARTICIPATE IN A CLASS ACTION." ER 69 (capitalization in original, emphasis omitted). Respondent Singh's service agreement set forth the mandatory arbitration agreement in full. Pet. App. 24a-25a. Respondents' Welcome Guides also advised: "By using T-Mobile service, you acknowledge that you have read and agree to the terms and conditions of the Service Agreement." ER 73, 112. Respondents' agreements provided them with the opportunity to cancel service without paying any cancellation fee. ER 97, 108. Respondents chose to keep their phones, to continue their T-Mobile service, and to accept the corresponding terms and conditions. See Pet. App. 14a; ER 69.

Section 3 of the terms and conditions sets forth an arbitration agreement, which provides in relevant part that both parties agree to arbitrate any disputes. Pet. App. 24a, 26a-27a. The arbitration provision applicable to Respondent Singh is reproduced at Pet. App. 24a-25a; the arbitration agreement applicable to Respondent Janda is reproduced at Pet. App. 26a-28a.

b. Notwithstanding respondents' agreements to arbitrate any disputes with T-Mobile on an individual

basis, in September 2005, they filed a proposed class action in California state court on behalf of three putative California classes: T-Mobile customers who were charged USF fees; T-Mobile customers who allegedly were charged for calls made during a billing period other than the period in which the calls were made; and T-Mobile customers who allegedly were charged additional fees for certain unspecified types of calls. ER 2. Respondents asserted four California causes of action arising from the assessment of USF fees and other usage charges associated with the use of T-Mobile phones. See First. Am. Compl. at 9-12 (ER 9-12). They sought injunctive relief, restitution, rescission, "[a]ctual damages," pre-judgment and post-judgment interest, costs of suit and attorney's fees, and "punitive damages." *Id.* at 12-13 (ER 12-13).

c. After removal to federal court, petitioner moved to compel arbitration under the FAA. Pet. App. 4a. On March 17, 2006, the district court denied T-Mobile's motion, ruling that the arbitration agreement was unconscionable under *Discover Bank* v. *Superior Court*, 113 P.3d 1100 (Cal. 2005), because it required individual arbitration. Pet. App. 19a-20a. After highlighting California precedent that purports to disallow arbitration agreements whenever a "'weaker party 'is presented a clause and told to "'take it or leave it'" without the opportunity for meaningful negotiation,'" Pet. App. 15a (alteration omitted) (quoting *Szetela* v. *Discover Bank*, 97 Cal. App. 4th 1094, 1100 (2002)), the district court ruled that the arbitration provisions were procedurally unconscionable. *Id.* at 15a-17a.

Further, following *Discover Bank*, the district court ruled that the class action waiver contained in the arbitration clauses was substantively unconscionable because the waiver was contained in standardized

consumer contracts, the claims involved allegations that T-Mobile had defrauded plaintiffs out of small amounts of damages, and thus "enforcing the class action waiver would effectively exempt T-Mobile 'from responsibility for its own fraud or willful injury to the person or personal property of another.'" Pet. App. 19a (quoting *Discover Bank*, 113 P.3d at 1110). The court also ruled, following *Discover Bank* and the Ninth Circuit's decision in *Ingle* v. *Circuit City Stores, Inc.*, 328 F.3d 1165, 1176 n.15 (9th Cir. 2003), that the FAA did not preempt its unconscionability analysis. Pet. App. 19a-20a (following *Discover Bank*, 113 P.3d at 1110-12).

d. The Ninth Circuit affirmed. It concluded, in an unpublished memorandum decision, that T-Mobile's arbitration agreement was "not substantively distinguishable" from an agreement that the Ninth Circuit had previously refused to enforce in *Shroyer* v. *New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007) and *Lowden* v. *T-Mobile USA, Inc.*, 512 F.3d 1213 (9th Cir. 2008). Pet. App. 2a. The panel explained that *Shroyer* "rejected the argument that California law on this issue is preempted by the Federal Arbitration Act." *Id.*

REASONS FOR GRANTING THE PETITION

This case implicates a conflict among the federal appellate courts on the question whether the Federal Arbitration Act requires enforcement of agreements to arbitrate that call for individual arbitration of consumer disputes, or whether such agreements can be invalidated based on state-law policy in favor of class actions.

This case presents the same issue as the one squarely presented in a prior petition filed by petitioner T-Mobile that is pending before this Court.

T-Mobile USA, Inc. v. *Laster*, No. 07-976 (filed Jan. 23, 2008). The *Laster* case involved a single arbitration agreement and the class claims addressed only the relationship between T-Mobile and its customers with respect to the sales tax associated with the purchase of a free wireless phone. See Pet'n for Writ of Certiorari at 6-11, *Laster*, No. 07-976. As explained in the *Laster* petition, that case presents an ideal vehicle to address and resolve the same conflict presented in this case. Although the issue presented in this case is equally worthy of review, there is no reason for the Court to consider more than one petition raising that same question.

To promote efficiency, petitioner requests that the Court grant review in *Laster* and hold the petition in this case pending the disposition in *Laster*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be held pending the Court's disposition of *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008), and then disposed of accordingly.

Respectfully submitted,

STEPHEN M. RUMMAGE
KRISTINA SILJA BENNARD
DAVIS WRIGHT TREMAINE LLP
Suite 2200
1201 Third Avenue
Seattle, WA 98101
(206) 622-3150

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
PETER C. PFAFFENROTH
JAMES C. OWENS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner T-Mobile USA, Inc.

April 18, 2008

* Counsel of Record

APPENDIX

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

No. 06-15712

KEVIN JANDA; MANJIT SINGH, on behalf of themselves and all others similarly situated and as private attorneys general on behalf of the members of the general public residing within the State of California,

Plaintiffs-Appellees,

v.

T-MOBILE USA, INC.,

Defendant-Appellant.

Submitted Feb. 15, 2008*
Filed Feb. 25, 2008.

Appeal from the United States District Court for the Northern District of California;
Jeffrey S. White, District Judge, Presiding.
D.C. No. CV-05-03729-JSW

Before D.W. NELSON and HAWKINS, *Circuit Judges*, and TIMLIN,** *Senior District Judge.*

---

* This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

** The Honorable Robert J. Timlin, Senior United States District Judge for the Central District of California, sitting by designation.

MEMORANDUM***

T-Mobile USA, Inc.'s ("T-Mobile") arbitration agreement, which requires customers to waive class action and bring claims only in an individual capacity, is not substantively distinguishable from the Cingular arbitration agreement we held unconscionable in *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir.2007). *See also Lowden v. T-Mobile*, ___ F.3d ___, 2008 WL 170279 (9th Cir.2008).

Even though T-Mobile's customers may have accepted the arrangement from the outset (rather than seeking another service provider), this court specifically rejected the "marketplace alternatives" rationale in *Shroyer*, 498 F.3d at 985-86, and California courts have done the same, *Gatton v. T-Mobile USA, Inc.*, 152 Cal.App.4th 571, 582-85, 61 Cal.Rptr.3d 344 (2007). *Shroyer* also expressly and conclusively rejected the argument that California law on this issue is preempted by the Federal Arbitration Act. *Shroyer*, 498 F.3d at 987-93. We therefore affirm the district court's denial of T-Mobile's motion to dismiss the action and to compel arbitration.[1]

AFFIRMED.

Similarly, because the arbitration clauses are substantively and procedurally unconscionable under *Shroyer*, we need not address T-Mobile's arguments regarding the additional provisions the district court found objectionable in Singh's arbitration agreement.

*** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[1] T-Mobile asks us to further rule that plaintiff Singh *must* proceed in court; however, this issue is not before us at this time, as Singh does not currently seek to proceed in arbitration proceedings (and affirmatively disavows any interest in doing so).

APPENDIX B

NOT FOR CITATION OR PUBLICATION

UNITED STATES DISTRICT COURT,
N.D. CALIFORNIA

No. C 05-03729 JSW

KEVIN JANDA, *et al.*
Plaintiffs,

v.

T-MOBILE, USA, INC.,
Defendant.

March 17, 2006

ORDER DENYING T-MOBILE, USA, INC.'S MOTION TO DISMISS AND COMPEL ARBITRATION AND DENYING AS MOOT PLAINTIFFS' MOTION TO STRIKE

JEFFREY S. WHITE, *J.*

INTRODUCTION

This matter comes before the Court upon consideration of the Motion to Strike Defendant's Affirmative Defense That Plaintiffs' Claims Must Be Arbitrated filed by Plaintiffs Kevin Janda ("Janda") and Manjit Singh ("Singh") (collectively "Plaintiffs") as well as the Motion to Dismiss and Compel Arbitration filed by Defendant T-Mobile, USA, Inc. ("T-Mobile"). Having considered the parties' pleadings

and the relevant legal authority and having had the benefit of oral argument, the Court HEREBY DENIES AS MOOT Plaintiffs' Motion to Strike and DENIES T-Mobile's Motion to Dismiss and Compel Arbitration.

PROCEDURAL HISTORY

On July 12, 2005, Plaintiffs filed a Complaint in Alameda County Superior Court. T-Mobile filed a notice of removal on September 15, 2005. (*See* Docket No. 1.) On September 26, 2005, Plaintiffs filed their First Amended Complaint ("FAC") alleging causes of action for violations of California's Consumer Legal Remedies Act ("CLRA"), violations of California Business and Professions Code § 17200, *et seq.* ("Section 17200"), violations of California Business and Professions Code § 17500, *et seq.* ("Section 17500"), and breach of contract on behalf of themselves and a putative class. T-Mobile filed its Answer to the FAC on October 11, 2005.

On December 8, 2005, Plaintiffs moved to strike T-Mobile's third affirmative defense, which asserts that Plaintiffs are bound to arbitrate their claims. On December 15, 2005, T-Mobile moved to dismiss and compel arbitration.

FACTUAL BACKGROUND[1]

A. Plaintiff Manjit Singh

In or about August 2002, Singh activated wireless telephone service with T-Mobile and has had continuous service since that time. (Declaration of Derek Chang in Support of T-Mobile USA, Inc.'s Motion to

---

[1] The facts set forth herein are undisputed unless specifically noted.

Dismiss and Compel Arbitration ("Chang Decl."), ¶ 4.) T-Mobile states that in order to activate his service, Singh would have been required to sign a service agreement. T-Mobile further asserts that Singh's service agreement would have been maintained by the dealer from whom Singh purchased his service. (*See* Chang Decl., ¶ 8, Ex. 3 at 1 (service agreement containing section entitled "Customer Acceptance (Required)").) Singh's signed service agreement is not part of the record; rather, T-Mobile proffers the version of its service agreement in place in August 2002 (hereinafter, "the 2002 Service Agreement").

The 2002 Service Agreement contains the following language, in small but bold font, immediately above the signature line: "You also acknowledge that you have received and reviewed the T-Mobile Terms and Conditions, and agree to be bound by them. . . . Disputes are subject to mandatory arbitration in accordance with paragraph 3 on the reverse."[2]

Paragraph 3, in turn, provides in full:

> Mandatory Arbitration; Dispute Resolution. ANY CLAIM OR DISPUTE BETWEEN YOU AND US ARISING UNDER OR IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, AND/OR OUR PROVISION TO YOU OF GOODS, SERVICE, OR UNITS SHALL BE SUBMITTED TO FINAL, BINDING ARBITRATION WITH THE AMERICAN ARBITRATION ASSOCIATION ("AAA") PURSUANT TO ITS PUBLISHED WIRELESS INDUSTRY ARBITRATION RULES, INCORPORATED HEREIN

[2] The reverse side of the 2002 Service Agreement is captioned "T-Mobile Terms and Conditions." (Chang Decl., Ex. 3 at 2.)

BY THIS REFERENCE AND AVAILABLE BY CALLING THE AAA AT 800-778-7879 OR VISITING ITS WEBSITE AT http://www.adr.org. Any arbitration proceeding shall be subject to the choice of law provision in Paragraph 22. Notice of an arbitration commenced by you must be served on our registered agent. No party may act as a representative of other claimants or potential claimants in any dispute, and two or more individuals' disputes may not be consolidated or otherwise determined in one proceeding. An arbitrator may not award relief in excess of or inconsistent with the provisions of the Agreement, order consolidation or arbitration on a classwide basis, or award lost profits, punitive, incidental or consequential damages or any other damages other than the prevailing party's direct damages, except that the arbitrator may order injunctive or declaratory relief pursuant to applicable law. All administrative expenses of an arbitration will be equally divided between you and Us, except if the claim is less than $1000, you will be obligated to pay only $25. If the claim is less than $25, We will pay all administrative expenses. Each party agrees to pay the fees and costs of its own counsel, experts, and witnesses at the arbitration. Subject to the foregoing limitations on consolidated or classwide proceedings, you agree, however, that if you fail to timely pay amounts due, We may assign your account for collection and the collection agency may pursue such claims in court limited strictly to the collection of the past due debt and any interest or cost of collection permitted by law or the Agreement. YOU ACKNOWLEDGE AND AGREE THAT THIS ARBITRATION PROVI-

> SION CONSTITUTES A WAIVER OF ANY RIGHT TO LOST PROFITS, PUNITIVE, SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL, OR TREBLE DAMAGES ("DISCLAIMED DAMAGES"), A JURY TRIAL OR PARTICIPATION AS A PLAINTIFF OR AS A CLASS MEMBER IN A CLASS ACTION. IF FOR ANY REASON THIS ARBITRATION CLAUSE IS DEEMED INAPPLICABLE OR INVALID, YOU AND WE BOTH WAIVE ANY CLAIMS TO RECOVER DISCLAIMED DAMAGES AND ANY RIGHT TO PURSUE, OR PARTICIPATE AS A PLAINTIFF OR AS A CLASS MEMBER IN, CLAIMS ON A CLASS-WIDE, CONSOLIDATED, OR REPRESENTATIVE BASIS.

(Chang Decl., Ex. 3.)[3]

In April 2004, Singh exchanged his handset. (*Id.*, ¶ 10.) T-Mobile asserts that a copy of the then current T-Mobile Welcome Guide was included with his phone and contained a section outlining T-Mobile's terms and conditions. (*Id.*, and Ex. 5.) Paragraph 1 of those terms and conditions states:

> [T]he T-Mobile Service Agreement you agreed to, and the terms and conditions related to use of any other T-Mobile service (together, the "Agreement") govern the use of the Service and your Unit. These Terms and Conditions supersede all earlier versions and, among other provisions, impose an early cancellation fee (see paragraph

---

[3] The Court will not speculate as to the exact size of the font, however in the copy of the document provided to the Court, the font size is significantly smaller than the 12 point font used in this Order.

> 7) and require mandatory arbitration of disputes (see paragraph 3). If there is a conflict between the Agreement and the T-Mobile terms and conditions sent with your Unit, the Agreement shall prevail.

(Chang Decl., Ex. 5 at T_M0000796.) Paragraph 2 provides that activation of service constitutes acceptance of the "Agreement." (*Id.*) Paragraph 3 contains the same version of the arbitration clause contained in the 2002 Service Agreement. (*Compare* Chang Decl., Ex. 3 *with* Chang Decl., Ex. 5 at T_ M000796.)

B. Plaintiff Kevin Janda.

On or about March 31, 2005, Janda executed a T-Mobile service agreement (hereinafter, the "2005 Service Agreement"). (Chang Decl., ¶ 6, Ex. 1.) The 2005 Service Agreement provides, in pertinent part:

- *THIS IS MY CONTRACT WITH T-MOBILE . . . FOR WIRELESS SERVICES.* MY CONTRACT IS CALLED A "SERVICE AGREEMENT" AND IT INCLUDES THIS DOCUMENT, THE SEPARATE T-MOBILE TERMS AND CONDITIONS, AND MY RATE PLAN INFORMATION. THE T-MOBILE TERMS AND CONDITIONS ARE IN MY WELCOME GUIDE OR WERE OTHERWISE PROVIDED TO ME AT THE TIME OF SALE. . . .
- I UNDERSTAND THAT THE SERVICE AGREEMENT AFFECTS MY AND T-MOBILE'S LEGAL RIGHTS. AMONG OTHER THINGS, IT *REQUIRES MANDATORY ARBITRATION OF DISPUTES*;

- *REQUIRES MANDATORY ARBITRATION OF DISPUTES*;
- *REQUIRES MANDATORY WAIVER OF THE RIGHT TO JURY TRIAL AND WAIVER OF ANY ABILITY TO PARTICIPATE IN A CLASS ACTION.*

(*Id.*, emphasis in original.)

Paragraph 3 of the T-Mobile terms and conditions applicable to Janda provides, in pertinent part:

> Mandatory Arbitration; Dispute Resolution. YOU WILL FIRST NEGOTIATE WITH US IN GOOD FAITH TO SETTLE ANY CLAIM OR DISPUTE BETWEEN YOU AND US IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, OR OUR PROVISION TO YOU OF GOODS, SERVICES, OR UNITS ("CLAIM"). YOU MUST SEND A WRITTEN DESCRIPTION OF YOUR CLAIM TO OUR REGISTERED AGENT (See Sec. 22). IF YOU DO NOT REACH AGREEMENT WITH US WITHIN 30 DAYS, INSTEAD OF SUING IN COURT, YOU AGREE THAT ANY CLAIM MUST BE SUBMITTED TO FINAL, BINDING ARBITRATION WITH THE AMERICAN ARBITRATION ASSOCIATION ("AAA") UNDER ITS PUBLISHED WIRELESS INDUSTRY ARBITRATION RULES, WHICH ARE A PART OF THIS AGREEMENT BY THIS REFERENCE AND WHICH ARE AVAILABLE BY CALLING THE AAA AT 800-778-7879 OR BY VISITING ITS WEBSITE AT http://www.adr.org.
>
> . . .
>
> Neither you nor we may be a representative of other potential claimants or a class of potential claimants in any dispute, nor may two or more

> individuals' disputes be consolidated or otherwise determined in one proceeding. While the prohibition on consolidated or class wide proceedings in this Sec. 3 will continue to apply: (a) you may take claims to small claims court, if they qualify for hearing by such court and (b) if you fail to timely pay amounts due, we may assign your account for the collection and the collection agency may pursue such claims in court limited strictly to the collection of the past due debt and any interest or cost of collection permitted by law or the Agreement. YOU AND WE ACKNOWLEDGE AND AGREE THAT THIS SEC. 3 WAIVES ANY RIGHT TO A JURY TRIAL OR PARTICIPATION AS A PLAINTIFF OR AS A CLASS MEMBER IN A CLASS ACTION. IF A COURT OR ARBITRATOR DETERMINES THAT YOUR WAIVER OF YOUR ABILITY TO PURSUE CLASS OR REPRESENTATIVE CLAIMS IS UNENFORCEABLE, THE ARBITRATION AGREEMENT WILL NOT APPLY AND OUR DISPUTE WILL BE RESOLVED BY A COURT OF APPROPRIATE JURISDICTION, OTHER THAN A SMALL CLAIMS COURT. SHOULD ANY OTHER PROVISION OF THIS ARBITRATION AGREEMENT BE DEEMED UNENFORCEABLE, THAT PROVISION SHALL BE REMOVED, AND THE AGREEMENT SHALL OTHERWISE REMAIN BINDING.

(Chang Decl., Ex. 2 at T_M0000042, emphasis in original.)[4]

---

[4] *See* note 3, *supra*.

ANALYSIS

A. Plaintiffs' Motion to Strike Affirmative Defense

Federal Rule of Civil Procedure 12(f) provides, in pertinent part, that "[u]pon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party . . . the court may order stricken from any pleading any insufficient defense. . . ." Fed.R.Civ.P. 12(f).

In their motion, Plaintiffs challenge the legal sufficiency of T-Mobile's affirmative defense on arbitration. Because the Court is required to address that question in the context of Defendant's motion to dismiss or compel, the Court DENIES AS MOOT Plaintiffs' motion to strike.

B. T-Mobile's Motion to Dismiss and Compel Arbitration

T-Mobile moves to dismiss Plaintiffs' complaint in favor of arbitration pursuant to their respective arbitration clauses. Plaintiffs assert that T-Mobile's arbitration clauses are procedurally and substantively unconscionable and, therefore, cannot be enforced.

1. Applicable Legal Standards.

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Once a court has determined that an arbitration agreement relates to a transaction involving inter-

state commerce, thereby falling under the Federal Arbitration Act ("FAA"), a court's only role is to determine whether a valid arbitration agreement exists and whether the scope of the parties' dispute falls within that agreement. *See* 9 U.S.C. § 4; *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir.2000).

The FAA represents the "liberal federal policy favoring arbitration agreements" and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Under the FAA, if a court determines that the parties have agreed to arbitrate, that the agreement has not been honored, and that the dispute falls within the scope of that agreement, a court must order arbitration. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967).

Notwithstanding the liberal policy favoring arbitration, by entering into an arbitration agreement, two parties are entering into a contract. *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (noting that arbitration "is a matter of consent, not coercion"). Thus, an arbitration agreement is "subject to all defenses to enforcement that apply to contracts generally." *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir.2003); *see also Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) ("[S]tate law may be applied 'if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.'") (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n. 9, 107 S.Ct.

2520, 96 L.Ed.2d 426 (1987)) (emphasis omitted). "Courts may not, however, invalidate arbitration agreements under state law applicable *only* to arbitration provisions." *Doctor's Assocs.*, 517 U.S. at 687, 116 S.Ct. 1652 (emphasis in original).

The Supreme Court recently has reiterated that, with respect to challenges to arbitration agreements, "an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing, Inc. v. Cardegna*, ___ U.S. ___, 126 S.Ct. 1204, 1209, 163 L.Ed.2d 1038 (2006). Unless a party raises a challenge to the arbitration clause itself, "the issue of the contract's validity is considered by the arbitrator in the first instance." *Id.* Therefore, although it is with-in this Court's province to determine whether a valid agreement to arbitrate exists, disputes over the meaning of specific terms within that agreement are matters for the arbitrator to decide. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002); *Prima Paint*, 388 U.S. at 403-04, 87 S.Ct. 1801 (holding that a "federal court may consider only issues relating to the making and performance of the *agreement to arbitrate*") (emphasis added).

2. The Plaintiffs Agreed to Arbitrate and the Claims Are Within the Scope of the Arbitration Clause.

Janda concedes that he signed the 2005 Service Agreement, which incorporates by reference T-Mobile's terms and conditions and states that arbitration is required. Those terms and conditions, in turn, contain the arbitration clause. Thus, the Court concludes that an agreement exists between Janda and T-Mobile to arbitrate disputes.

Singh argues that T-Mobile has not shown he agreed to arbitrate his claims. It is undisputed, however, that Singh activated phone service with T-Mobile and exchanged his handset in 2004. According to T-Mobile's terms and conditions, activation of service constitutes acceptance of T-Mobile's terms and conditions, including the arbitration clause. (*See* Chang Decl., Ex. 4 at T_M0000643, Ex. 5 at T_M0000796.) The terms and conditions Singh would have received with his original phone and his new handset contain the same arbitration clause contained in the service agreement alleged to be applicable to him. (*Compare id.*, Ex. 3 *with* Exs. 4, 5.) As such, the Court concludes that T-Mobile has established that an agreement exists between Singh and T-Mobile to arbitrate disputes.

Because Plaintiffs do not dispute that the majority of their claims fall within the arbitration clauses or that they have honored the agreement, unless the arbitration clauses are not enforceable based "upon such grounds as exist at law or in equity for the revocation of any contract," the Court must compel arbitration.[5]

3. The Arbitration Clauses Should Not Be Enforced.

Plaintiffs contend that the arbitration clauses are unconscionable and, therefore, unenforceable. Under California law, the "[u]nonscionability analysis begins with an inquiry into whether the contract is one of adhesion." *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 113,

---

[5] In light of the Court's ruling denying the motion to compel, the Court does not reach the issue of whether Plaintiffs' claims for injunctive relief are arbitrable.

99 Cal.Rptr.2d 745, 6 P.3d 669 (2000). As the *Armendariz* court explained, a contract of adhesion "'signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'" *Id.* (quoting *Neal v. State Farm Ins. Co.,* 188 Cal.App.2d 690, 694, 10 Cal.Rptr. 781 (1961)).

When a party challenges an arbitration agreement on the basis of unconscionability, that party must demonstrate that the arbitration agreement is both procedurally and substantively unconscionable. *See id.* at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669. Although a party must establish both elements, those elements exist on a sliding scale. *Id.* "In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id.*

a. Plaintiffs have met their burden to show that the arbitration clauses are procedurally unconscionable.

"Procedural unconscionability addresses the manner in which agreement to the disputed term was sought or obtained, such as unequal bargaining power between the parties and hidden terms included in contracts of adhesion." *Szetela v. Discover Bank,* 97 Cal.App.4th 1094, 1099, 118 Cal.Rptr.2d 862 (2002); *cf. Armendariz,* 24 Cal.4th at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669 (procedural element focuses on "oppression" or "surprise"). When a weaker party "is presented [a] clause and told to 'take it or leave it' without the opportunity for meaningful negotiation, oppression, and therefore procedural unconscionabil-

ity" will be present. *Szetela,* 97 Cal.App.4th at 1100, 118 Cal.Rptr.2d 862.

Plaintiffs argue that the arbitration clauses are procedurally unconscionable primarily on the basis that the "the arbitration provisions . . . are contained in form, adhesion contracts." Although the Service Agreements and Welcome Guides in question would satisfy the definition of an "adhesion contract" as set forth in *Armendariz,* the Court expresses no opinion whether those documents in their *entirety* are unconscionable. Rather, the Court focuses its analysis on the arbitration clauses, which Plaintiffs also contend are procedurally unconscionable. *See Buckeye,* 126 S.Ct. at 1209.

Plaintiffs claim that the arbitration clauses are procedurally unconscionable because these clauses are buried and in small font in the Welcome Guide that is included in T-Mobile's phone box, rather than on the face of a Service Agreement. Janda's 2005 Service Agreement states on its face that it requires mandatory arbitration of disputes, mandatory waiver of the right to jury trial, and mandatory waiver of the ability to participate in a class action. (Chang Decl., Ex. 1.) However, the entire arbitration clause is not set forth in the 2005 Service Agreement. Rather, it is contained on page 49 of T-Mobile's over 60 page Welcome Guide. As to Plaintiff Singh, the front of the 2002 Service Agreement states in small but bold font that "[d]isputes are subject to mandatory arbitration in accordance with paragraph 3 on the reverse," and the arbitration clause at issue is set forth in full on the reverse of that agreement, again in small font. In addition, as with Janda, the arbitration clause is also not set forth until near the end of the Welcome Guide. Plaintiffs also claim that the arbitration

clauses were presented on a take it or leave it basis, and T-Mobile admits that Janda and Singh could not have obtained service without agreeing to arbitrate.

The Court concludes that on these facts Plaintiffs have set forth sufficient evidence to show that the arbitration clauses applicable to their claims are procedurally unconscionable.

b. Plaintiffs have met their burden to show that the class action waiver cannot be enforced.

Under California law, the concept of substantive unconscionability relates to the actual terms of the arbitration agreement and whether those terms are "overly harsh" or "one-sided." *Armendariz,* 24 Cal.4th at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669. Plaintiffs, contend that the arbitration clauses' prohibitions on class treatment render them substantively unconscionable under the California Supreme Court's holding in *Discover Bank v. Superior Court,* 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005). In *Discover Bank,* that court held that, while not all class action waivers are unconscionable,

> when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." (Civ.Code, § 1668.)

> Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

Discover Bank, 36 Cal.4th at 162-63, 30 Cal.Rptr.3d 76, 113 P.3d 1100. The Court concludes that the rationale of *Discover Bank* applies in this case.

It is undisputed that the contracts at issue in this case, as a whole, are standardized consumer contracts which were imposed and drafted by T-Mobile, the party of superior bargaining strength, and the Plaintiffs were provided only the opportunity to adhere to the contract or reject it. Thus, without expressing an opinion on the *validity* of the Service Agreements and Welcome Guides in their *entirety,* they would satisfy the definition of an adhesion contract as set forth in *Armendariz. Armendariz,* 24 Cal.4th at 113, 99 Cal.Rptr.2d 745, 6 P.3d 669. Thus, the Court concludes that the first of the three considerations elucidated in *Discover Bank* is satisfied here. T-Mobile also has not contested that the disputes involved in this case, on an individual basis, involve small amounts of damages. (*See, e.g.,* Notice of Removal ¶ 5.) Thus, the second of the three considerations elucidated in *Discover Bank* is satisfied.

The final question the Court must consider is whether the complaints allege "a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Discover Bank,* 36 Cal.4th at 163, 30 Cal.Rptr.3d 76, 113 P.3d 1100. In the FAC, Plaintiffs allege that T-Mobile charged a "Universal Service Fund Fee" and/or a "Regulatory Cost Recovery Fee" in addition to the posted and advertised cost of mobile service, which it was not required by law to impose. Plaintiffs further contend that these fees "were created and imposed by [T-

Mobile] on its customers, to cover the cost of" what was in fact an ordinary business expense. (FAC, ¶¶ 1, 3-9.) Plaintiffs also allege that T-Mobile charged its customers for telephone calls during a billing period in a billing period other than which the calls were made, *i.e.* for "calls that exceed their monthly allotment of minutes during billing periods other than the billing periods in which the allotment was actually exceeded." (*Id.*, ¶¶ 1, 10-12.) Finally, Plaintiffs contend they were improperly charged for "roaming fees, long distance fees, T-Mobile to T-Mobile fees, and weekend and/or nighttime fees that were supposed to be free of charge." (*Id.*, ¶¶ 1, 13.)

Plaintiffs contend that each of these alleged practices violate California laws on unfair competition, consumer protection and false advertising and also constitute breaches of contract. The Court finds these allegations satisfy the last prong of the *Discover Bank* test and concludes that enforcing the class action waiver would effectively exempt T-Mobile "from responsibility for [its] own fraud or willful injury to the person or personal property of another." *Discover Bank,* 36 Cal.4th at 163, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (quoting Cal. Civ.Code, § 1668). *See also Laster v. T-Mobile U.S.A., Inc.,* 407 F.Supp.2d 1181, 1190-92 (S.D.Cal.2005) (finding class waiver provision in T-Mobile arbitration clause substantively unconscionable under *Discover Bank* and unenforceable where plaintiffs demonstrated procedurally unconscionability).

T-Mobile asserts that the holding in *Discover Bank* does not apply to contracts in general and, thus, is preempted by the FAA. The California Supreme Court expressly rejected this argument after it examined and applied pertinent United States Supreme

Court authority on the issue. *Discover Bank,* 36 Cal.4th at 163-67, 30 Cal.Rptr.3d 76, 113 P.3d 1100. The Ninth Circuit similarly has rejected the preemption argument. *See Ingle,* 328 F.3d at 1176 n. 15. Indeed, in *Ingle* the Ninth Circuit rejected the reasoning of the appeals court for the same reason that the California Supreme Court rejected the court of appeal's decision, namely that its holding was premised on a conclusion that the prohibition against class actions was substantively unconscionable, a defense applicable to all contracts not just contracts containing arbitration clauses. *Id.; cf. Ting v. AT&T,* 319 F.3d 1126, 1152 (9th Cir.2003) (finding no preemption where trial court's decision was based on findings that agreement at issue was substantively unconscionable, a defense applicable to all contracts).

Accordingly, the Court finds that the class action waiver is substantively unconscionable and, therefore, is unenforceable. This finding resolves the motion as to Janda because the express terms of his arbitration agreement provide that, "[i]f a court or arbitrator determines that your waiver of your ability to pursue a class or representative claims is unenforceable, the arbitration agreement will not apply and our dispute will be resolved by a court of appropriate jurisdiction, other than a small claims court." (Chang Decl., Ex. 2.) The arbitration clause applicable to Singh does not, however, contain this language. Thus, the Court must determine whether the class waiver can be severed from the arbitration clause.

c. Singh's arbitration clause is permeated with an unlawful purpose and shall not be enforced.

Under California law, "[i]f the central purpose of [a] contract is tainted with illegality, then the con-

tract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." *Armendariz,* 24 Cal.4th at 124, 99 Cal.Rptr.2d 745, 6 P.3d 669. In *Armendariz,* the California Supreme Court declined to sever what it found to be unconscionable provisions of an arbitration agreement because those provisions so permeated the arbitration clause with an unlawful purpose that they could not be severed. *Id.* That court also noted that there was no single provision that the trial court could strike or restrict without having to "in effect, reform the contract, not through severance or restriction, but by augmenting it with additional terms. [California] Civil Code section 1670.5 does not authorize such reformation by augmentation. . . ." *Id.* at 125, 99 Cal.Rptr.2d 745, 6 P.3d 669. "Nor do courts have any such power under their inherent limited authority to reform contracts." *Id.* Therefore, the California Supreme Court concluded the trial court had not abused its discretion in voiding the offending arbitration clause in its entirety. *Id.*

In addition to the class waiver provision, Singh's arbitration clause provides that "an arbitrator may not award relief in excess of or inconsistent with the provisions of the Agreement . . . or award lost profits, punitive, incidental or consequential damages or any other damages other than the prevailing party's direct damages." (Chang Decl., Ex. 3, Ex. 5 at T_M0000796.) The arbitration clause further provides that "[e]ach party agrees to pay the fees and costs of its own counsel . . . at the arbitration," which based on the language above would appear to limit a customer's ability to seek attorneys' fees to which he

or she might otherwise be entitled. (*Id.*) Therefore, to the extent these provisions would deprive an arbitrator to award Singh "authorized remedies, or relief in court that would otherwise be allowable to" him, these provisions are also unconscionable. *See Independent Ass'n of Mailbox Center Owners v. Superior Court,* 133 Cal.App.4th 396, 411-12, 34 Cal.Rptr.3d 659 (2005).[6] Finally, although neither party focuses on this provision of Singh's arbitration clause, it provides that if it is found to be unenforceable, the parties "waive any claims to recover disclaimed damages and any right to pursue or participate as a plaintiff or as a class member in claims on a class-wide, consolidated, or representative basis," *i.e.* T-Mobile attempts to import the unconscionable provisions into the judicial forum. The Court finds this provision to be unconscionable as well.

Accordingly, the Court concludes that the class waiver and limitations on remedies provisions, as well as the fact that T-Mobile attempts to import these unconscionable provisions from the arbitral to

---

[6] T-Mobile argues that the Ninth Circuit's holding in *Ting,* precludes this Court from striking the limitations on remedies provisions because these remedies are only available under the CLRA. T-Mobile contends that the FAA preempts application of the CLRA. *See Ting,* 319 F.3d at 1148. The Ninth Circuit's holding on preemption, however, was based upon the fact that the district court had applied the CLRA's antiwaiver provision to void provisions of the arbitration agreement, something this Court has not done. *See id.*(finding CLRA was not law of general applicability and, therefore, antiwaiver provision of that act was preempted by the FAA). In contrast, this Court's decision is based upon the fact that the provisions are unconscionable, a principle of law applicable to all contracts. *See id.* at 1149-50 (affirming district court's decision on grounds that offending provisions were unconscionable).

the judicial forum so permeates Singh's arbitration clause with an unlawful purpose that these offending provisions cannot be severed or restricted because to do so would essentially result in reforming Singh's arbitration clause. *See Armendariz,* 24 Cal.4th at 124, 99 Cal.Rptr.2d 745, 6 P.3d 669. Accordingly, the Court concludes that Singh's arbitration clause must be voided in its entirety.

CONCLUSION

For the foregoing reasons, the Court HEREBY DENIES T-Mobile's motion to compel arbitration and DENIES AS MOOT Plaintiffs' motion to strike. The parties shall appear for a case management conference on Friday, May 26, 2006 at 1:30 p.m. The parties' joint case management conference statement shall be due on Friday, May 19, 2006.

IT IS SO ORDERED.

APPENDIX C

T-MOBILE TERMS AND CONDITIONS

* * * *

3. Mandatory Arbitration: Dispute Resolution. ANY CLAIM OR DISPUTE BETWEEN YOU AND US ARISING UNDER OR IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, AND/OR OUR PROVISION TO YOU OF GOODS, SERVICE, OR UNITS SHALL BE SUBMITTED TO FINAL, BINDING ARBITRATION WITH THE AMERICAN ARBITRATION ASSOCIATION ("AAA") PURSUANT TO ITS PUBLISHED WIRELESS INDUSTRY ARBITRATION RULES, INCORPORATED HEREIN BY THIS REFERENCE AND AVAILABLE BY CALLING THE AAA AT 800-778-7879 OR VISITING ITS WEB SITE AT www.adr.org. Any arbitration proceeding shall be subject to the choice of law provision in paragraph 22. Notice of an arbitration commenced by you must be served on our registered agent. No party may act as a representative of other claimants or potential claimants in any dispute, and two or more individuals' disputes may not be consolidated or otherwise determined in one proceeding. An arbitrator may not award relief in excess of or inconsistent with the provisions of the Agreement, order consolidation or arbitration on a classwide basis, or award lost profits, punitive, incidental, or consequential damages or any other damages other than the prevailing party's direct damages, except that the arbitrator may order injunctive or declaratory relief pursuant to applicable law. All administrative expenses of an arbitration will be equally divided between you and Us, except if the claim is less than $100, you will be obligated to pay only $25. If the claim is less than $25, We will

pay all administrative expenses. Each party agrees to pay the fees and costs of its own counsel, experts, and witnesses at the arbitration. Subject to the foregoing limitations on consolidated or classwide proceedings, you agree, however, that if you fail to timely pay amounts due, We may assign your account for collection and the collection agency may pursue such claims in court limited strictly to the collection of the past due debt and any interest or cost of collection permitted by law or the Agreement.

YOU ACKNOWLEDGE AND AGREE THAT THIS ARBITRATION PROVISION CONSTITUTES A WAIVER OF ANY RIGHT TO LOST PROFITS, PUNITIVE, SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL, OR TREBLE DAMAGES ("DISCLAIMED DAMAGES"), A JURY TRIAL OR PARTICIPATION AS A PLAINTIFF OR AS A CLASS MEMBER IN A CLASS ACTION. IF FOR ANY REASON THIS ARBITRATION CLAUSE IS DEEMED INAPPLICABLE OR INVALID, YOU AND WE BOTH WAIVE ANY CLAIMS TO RECOVER DISCLAIMED DAMAGES AND ANY RIGHT TO PURSUE, OR PARTICIPATE AS A PLAINTIFF OR AS A CLASS MEMBER IN, CLAIMS ON A CLASSWIDE, CONSOLIDATED, OR REPRESENTATIVE BASIS.

* * * *

3/02

* * * *

T-MOBILE TERMS AND CONDITIONS

* * * *

3. Mandatory Arbitration: Dispute Resolution. YOU WILL FIRST NEGOTIATE WITH US IN GOOD FAITH TO SETTLE ANY CLAIM OR DISPUTE BETWEEN YOU AND US IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, OR OUR PROVISION TO YOU OF GOODS, SERVICES, OR UNITS ("CLAIM"). YOU MUST SEND A WRITTEN DESCRIPTION OF YOUR CLAIM TO OUR REGISTERED AGENT (See Sec. 22). IF YOU DO NOT REACH AGREEMENT WITH US WITHIN 30 DAYS, INSTEAD OF SUING IN COURT, YOU AGREE THAT ANY CLAIM MUST BE SUBMITTED TO FINAL, BINDING ARBITRATION WITH THE AMERICAN ARBITRATION ASSOCIATION ("AAA") UNDER ITS PUBLISHED WIRELESS INDUSTRY ARBITRATION RULES, WHICH ARE A PART OF THE AGREEMENT BY THIS REFERENCE AND ARE AVAILABLE BY CALLING THE AAA AT 800-778-7879 OR VISITING ITS WEB SITE AT www.adr.org. You must serve our registered agent (See Sec. 22) with a notice of an arbitration in order to begin an arbitration. This agreement to arbitrate extends to claims that you assert against other parties, including without limit equipment manufacturers and dealers, if you also assert claims against us in the same proceeding. The Agreement involves interstate commerce and despite the choice of law provision in Sec. 25, the Federal Arbitration Act and federal arbitration law govern arbitrations under the Agreement. An arbitrator may only award as much relief as a court having jurisdiction in the place of arbitration, limited to the same extent that a court would limit such relief and consistent with the

provisions of the Agreement. An arbitrator may order injunctive or declaratory relief (so long as that injunctive or declaratory relief does not apply beyond your dealings with us) or summary judgment under applicable law. AAA has a fee schedule for arbitrations. You will pay your share of the arbitrator's fees except: (a) for claims less than $25, we will pay all arbitrator's fees and (b) for claims between $25 and $1000, you will pay $25 for the arbitrator's fee. You and we agree to pay our own other fees, costs and expenses including those for counsel, experts, and witnesses. Visit www.adr.org arbitrator fee information in hardship circumstances.

Neither you nor we may be a representative of other potential claimants or a class of potential claimants in any dispute, nor may two or more individuals' disputes be consolidated or otherwise determined in one proceeding. While the prohibition on consolidated or classwide proceedings in this Sec. 3 will continue to apply: (a) you may take claims to small claims court, if they qualify for hearing by such court and (b) if you fail to timely pay amounts due, we may assign your account for collection and the collection agency may pursue such claims in court limited strictly to the collection of the past due debt and any interest or cost of collection permitted by law or the Agreement. YOU AND WE ACKNOWLEDGE AND AGREE THAT THIS SEC. 3 WAIVES ANY RIGHT TO A JURY TRIAL OR PARTICIPATION AS A PLAINTIFF OR AS A CLASS MEMBER IN A CLASS ACTION. IF A COURT OR ARBITRATOR DETERMINES THAT YOUR WAIVER OF YOUR ABILITY TO PURSUE CLASS OR REPRESENTATIVE CLAIMS IS UNENFORCEABLE, THE ARBITRATION AGREEMENT WILL NOT APPLY AND OUR DISPUTE WILL BE RESOLVED BY A

COURT OF APPROPRIATE JURISDICTION, OTHER THAN A SMALL CLAIMS COURT. SHOULD ANY OTHER PROVISION OF THIS ARBITRATION AGREEMENT BE DEEMED UNENFORCEABLE, THAT PROVISION SHALL BE REMOVED, AND THE AGREEMENT SHALL OTHERWISE REMAIN BINDING.

* * * *

5/04

* * * *